THE USE OF NON-DISCLOSURE AGREEMENTS

Non-disclosure agreements (NDA's) are often used by employers to facilitate the final resolution of complex disputes with employees, for example in sexual harassment cases. They can be considered as 'buying silence' over embarrassing incidents. In some organisations, NDAs are used so routinely that they are considered normal practice.

Overseas experience

In the US, Fox News celebrity presenter Gretchen Carlson was prevented from disclosing the gross sexual harassment she was subjected to by Roger Ailes through being coerced into signed an NDA in 2016. Despite this, the case became a well-known case study because he had harassed so many female staffers at the organisation that the film Bombshell, released in 2019, could be researched through interviewing anonymously many of them.

Also in the US, in the case of Harvey Weinstein, "the disgraced movie producer accused of sexual abuse, used non-disclosure agreements (NDAs) to silence his victims and witnesses. When The Weinstein Company filed for bankruptcy in March, the company said that the NDAs were no longer in effect and that "no one should be afraid to speak out or coerced to stay quiet"."[1]

In the UK, during 2019 there was a considerable tightening up of the legal framework governing the use of NDA's following a Parliamentary inquiry into the misuse of NDA's. For example, such agreements are not enforceable unless the employee has received independent advice on the nature and consequences of the agreement. In addition, the confidentiality obligations in any such agreement do not affect the employee's right to raise a protected disclosure to authorities, report wrong doing to a regulator or to report a criminal offence.

Even if they have signed a confidentiality agreement, workers may be legally entitled to make a protected disclosure under whistleblowing law if they meet certain criteria:

- They must reasonably believe that both the information they disclose and any allegation contained in it are substantially true;

[1] https://gwii.co.za/legal-talk-victims-of-sexual-harassment-should-be-careful-of-what-they-sign/

- They cannot be acting for personal gain;
- They have to have already blown the whistle to their employer or a prescribed person – usually a regulatory body – unless the wrongdoing is exceptionally serious or they reasonably believe that their employer will subject them to 'detriment' or conceal or destroy evidence if they do so; and
- The making of the disclosure must be reasonable in all circumstances.

The CIPD (the professional body for HR practitioners in the UK) has informed its members that they have a duty to ensure that such agreements are used ethically and appropriately. Its guidance also says that such agreements "should not be used to cover up cases of alleged discrimination and/or bullying, or to deter a person from reporting misconduct such as making a protected disclosure under whistleblowing legislation."[2]

South African legislative framework

The law around the use of NDA's in sexual harassment cases is not as clear cut here in South Africa. According to Jean Ewang, Partner at Hogan Lovells, in an article published online: "In theory an employer and employee, be it the victim or accused, can negotiate a settlement agreement. This will be treated as any contract and governed by ordinary contractual laws. An NDA can never stop someone from complying with a legal obligation or provide for illegal action to be taken. Employees who are victims of sexual harassment are under no obligation to conclude a NDA, and should take legal advice prior to the conclusion of any such agreement. Employees should be cognisant of the fact that there exist mechanisms within the law to assist them and through which they can obtain recourse." As regards the ethics of NDA's, she continues "A multitude of factors should be considered prior to concluding a NDA with an employee on either side of a sexual harassment claim. These should be entered into cautiously having due regard to the specific circumstances of the case. The company does not want to be seen as contributing to silencing the victims, condoning bad behaviour or to sweep issues of sexual harassment under the rug, and therefore should always consider the specific circumstances of the case before making use of a NDA."[3]

NDA's usually involve a financial settlement in exchange for an agreement not to disclose either the nature of the financial settlement, the fact that there was a settlement at all, and/or any details of the harassment. The NDA will usually include a 'full and final settlement' clause which ostensibly would prevent either of the parties from pursuing any further action.

Where an NDA is entered into with an alleged perpetrator, it might involve a voluntary resignation on his/her part in exchange for the organisation dropping all disciplinary charges and keeping all details of the incident confidential. It might even involve a financial settlement. This might be attractive to the organisation to "get rid of the problem".

To enforce an NDA, one of the parties would have to go to court and obtain an interdict. Such court proceedings would therefore bring the case to public attention anyway.

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[2] https://www.cipd.co.uk/knowledge/fundamentals/emp-law/harassment/sexual-harassment-work-guide

[3] https://gwii.co.za/legal-talk-victims-of-sexual-harassment-should-be-careful-of-what-they-sign/

However, signing a NDA does not prevent an employee from subsequently making a protected disclosure, provided that it is a "*bona fide*" protected disclosure in terms of the Protected Disclosures Act (PDA). The Act states that no legal provision, such as an employment contract, confidentiality or non-disclosure agreement, can be used to prevent someone exercising their rights under the Act. Any clause in the NDA seeking to prevent an employee from making a protected disclosure in good faith would therefore be illegal. However, it would be important for the employee to understand his/her rights regarding the specifics of an envisaged disclosure before doing so.

Ethics for South African HR practitioners

It has been the case often in South Africa that NDAs are used to facilitate the quiet exit of a senior but troublesome harasser, and as such, organisations are vulnerable to accusations of having allowed perpetrators to 'get away with it' and go and repeat their behaviour somewhere else. Given the generous remuneration packages of senior executives, these financial settlements are often perceived by other employees as allowing those executives to walk away 'with millions'. The irony is that it is seldom the case that the sexual harassment remains hidden from other employees and allowing the perpetrator to 'get away with it' is perceived amongst the workforce as unethical and a violation of espoused organisational values.

Ethics guidance for HR practitioners in South Africa is therefore no different to that of the CIPD in the UK, which is repeated here:

"They have a duty to ensure that such agreements are used ethically and appropriately. Such agreements should not be used to cover up cases of alleged discrimination and/or bullying, or to deter a person from reporting misconduct such as making a protected disclosure under whistleblowing legislation."

An organisation with a practice of using these NDAs in such cases would be highly vulnerable to challenge by an employee(s) under the Employment Equity Act for creating or perpetrating a 'hostile environment' and could be subject to expensive compensation and damages claims.

Good practice

Guidance on the Use of Confidentiality Agreements in Discrimination Cases by the UK's Equality and Human Rights Commission, issued in October 2019[4], could usefully be followed here in South Africa. This document is extensively quoted below, but the original is worth referring to as it includes scenarios and case examples to clarify some points.

[4] https://www.equalityhumanrights.com/en/publication-download/use-confidentiality-agreements-discrimination-cases

"In most cases, it will not be necessary or appropriate for an employer to use confidentiality agreements that stop a worker discussing an act of discrimination with others. [Our emphasis] However, their use may be appropriate in some cases, such as where:

- the worker asks for a confidentiality agreement or confirms to the employer that they would like to use one because, for example, they would like the act of discrimination kept confidential
- the employer wants to use a confidentiality agreement in a settlement agreement with a witness to an act of discrimination, where the person who was the victim of discrimination has made clear that they want the matter to remain confidential
- in rare instances, following a thorough investigation and a fair hearing of a complaint, the evidence shows that a worker has been falsely accused of discriminating against another worker and the employer uses a confidentiality agreement to protect the reputation of the falsely accused individual
- there are legitimate business interests. For example, an employer wants to maintain confidentiality for the duration of an investigation into the discrimination and any disciplinary and tribunal proceedings to avoid any such proceedings being prejudiced.

Each time an employer considers including a confidentiality agreement in a settlement agreement, the employer should weigh up the following factors:

- whether there is a clear reason why a confidentiality agreement is needed
- what the benefit to the employer of including the confidentiality agreement would be
- the impact of the confidentiality agreement on the worker
- the impact that confidentiality agreements may have on the culture of the organisation
- the benefits of not using confidentiality agreements.

Where confidentiality agreements are used, they should be worded to deal with the particular circumstances of the case; the wording should not go beyond what is necessary and appropriate in those circumstances. For example, if the employer's main concern is the worker discussing with other workers how much compensation they have been paid, then a confidentiality agreement could be drafted to prevent them discussing that without preventing them from discussing the act of discrimination itself.

The wording of the confidentiality agreement should allow the worker to have discussions with the following people and organisations:

- any relevant regulator
- the police
- any medical professional or counsellor who is bound by an obligation of confidentiality
- a legal or tax advisor who is bound by an obligation of confidentiality
- Her Majesty's Revenue and Customs
- the worker's spouse, partner or other immediate family members (provided they are also asked to keep the matter confidential)
- the worker's trade union
- a potential employer where and to the extent necessary to discuss the circumstances in which their previous employment ended.

Where confidentiality agreements are used, they should not normally impose an obligation on a worker that is not also imposed on the employer. For example, if an agreement obliges the worker

not to discuss a certain issue, it should also place a mutual obligation on the employer to require its other workers not to discuss the same issue.

To rely on the reasonable steps defence [in South African terms, to show that it has taken reasonable steps to prevent discrimination] it therefore follows that, where a settlement agreement has been used to settle a claim, the employer must not treat this as the end of the matter. The employer must still investigate the allegations where it is possible and reasonable to do so, take any reasonable further steps to address the discrimination and take reasonable steps to prevent discrimination occurring again in the future.

Employers should monitor their use of confidentiality agreements. Large employers, employers who use a significant number of settlement agreements and employers who operate across multiple sites should keep a central record of confidentiality agreements [Note for South Africa: this will have to be in accordance with the POPI Act]. This will allow them to monitor potential systemic discrimination issues in their organisation. A central record could include, for example:

- when confidentiality agreements have been used
- what type of claim they were used for
- who any allegations of discrimination were made against
- what type of confidentiality agreement was used, and
- why they were used.

To check that confidentiality agreements are not being misused or overused:

- the employer's board of directors (or equivalent) should have oversight of the central record of confidentiality agreements
- the use of a confidentiality agreement should be signed off by a director (or equivalent) or by an appropriately delegated senior manager
- confidentiality agreements should, where reasonably possible, be signed off by someone who was not involved in the act of discrimination or in hearing any grievance related to it
- the board of directors (or equivalent) should ensure that policies and procedures require managers to escalate concerns about the workplace culture, systemic discrimination or repeated or highly serious acts of discrimination by one individual.

Either a worker or an employer can make a claim for breach of contract if the other party breaches the settlement agreement. Employers may seek to include a clause within a settlement agreement, the purpose of which is to seek compensation from the worker if they breach it. Clauses requiring the worker to pay compensation that is out of all proportion to the damage caused to the employer by the breach, will be considered to be a penalty clause and unenforceable. Penalty clauses must not be used.

Sometimes settlement agreements include warranties under which the worker promises something to the employer. There is evidence that workers have sometimes been required to promise (or 'warrant') that they are not aware of anything that would be a protected disclosure or a criminal offence. This can put the worker in a very difficult position; they may feel under pressure to agree to the warranty even though they are aware of such information. If the worker then discusses the information at a later date, the employer may say they have breached the warranty. In this way, the warranty will potentially have the same silencing effect as a confidentiality agreement. As it is not lawful to use a confidentiality agreement to stop a worker making a protected disclosure or reporting a criminal offence, such warranties should not be used either.

Employers should, however, encourage workers to raise any issues relating to their employment including protected disclosures and criminal offences, without the threat of breaching a warranty. This should be done through the employer's usual processes such as one-to-ones and exit interviews."

South African HR practitioners are advised therefore to be very careful in the use of NDA's and should advise management of the risks and potential consequences of a misuse or over-use of such agreements.

This article was written by Dr Penny Abbott.